Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

COMMENTS OF TELOCATOR

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TABLE OF CONTENTS

Page

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	)	
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Telocator, the Personal Communications Industry Association, hereby files its comments in response to the above-captioned Notice of Proposed Rulemaking issued in this proceeding.[1] Telocator welcomes the opportunity to address the appropriate regulatory treatment of mobile radio services under the recent amendments to Sections 3(n) and 332 of the Communications Act.[2] The promotion of full and fair competition among mobile service providers is critical to the realization of the immense public benefits that can be generated by both existing and new wireless technologies.

I. INTRODUCTION AND STATEMENT OF INTEREST

The Commission's proposals in this proceeding represent a comprehensive and fundamental redefinition of the

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[1] Implementation of Sections 3(n) and 332 of the Communications Act, FCC 93-454 (released Oct. 8, 1993) ("Notice").

[2] 47 U.S.C. §§ 153(n) and 332.

regulatory framework for all mobile radio services. As the trade association representing providers of the full range of such services, both existing (paging and cellular) and emerging (broadband and narrowband PCS), Telocator has a vital interest in any such development. The rules promulgated herein will have a major impact on the ability of the mobile radio industry to deliver diverse and improved services to the public.

Mobile radio services represent one of the most dynamic, fastest growing and important segments of the telecommunications industry in the United States. They are increasingly recognized as a critical component of the information infrastructure with broad ramifications for advances in the U.S. economy and productivity. Consequently, they are vital to national competitiveness in the world market.

The personal communications industry cannot, however, achieve its maximum potential unless the Commission establishes a uniform and rational regulatory program for wireless services that avoids imposing onerous and unnecessary burdens on mobile radio service providers. The present proceeding provides a unique opportunity to achieve this goal while resolving many contentious and costly regulatory debates. Accordingly, Telocator, which has actively participated before the Commission in earlier proceedings addressing such issues, herein offers its recommendations for fostering the

development of the mobile radio services in the public interest.

II. SUMMARY

In its industry and government relations efforts, Telocator has consistently attempted to apply the following fundamental principles in representing the interests of mobile services providers. First, functionally equivalent services competing in the same markets should be subject to the same regulatory rights and obligations. For example, regardless of whether the Commission ultimately determines to classify paging as a commercial mobile service ("CMS") or a private mobile service, all such offerings should be delivered to the public under the same set of rules. Moreover, the agency should recognize that, because the mobile services market is evolving at a rapid pace, classification decisions for regulatory purposes must accommodate not only service offerings and market conditions that exist today, but also future developments. Otherwise, there will be a risk that disparate treatment of competitive services will reappear.

Second, to the greatest extent practicable, competition rather than regulatory intervention should govern the competitive wireless communications marketplace. It follows that the Commission should forbear to the greatest possible extent from imposing Title II regulatory requirements on CMS.

It is beyond dispute that the current regulatory treatment of common carrier mobile services, which originated in a regulatory model designed for a wired telephone industry characterized by monopoly providers, can no longer serve the public interest. In recognition of this fact, Congress created the CMS category and empowered the FCC to eliminate traditional common carrier regulatory requirements for mobile service providers.

The current competitive state of the mobile services market fully supports these Congressional efforts. There are more than 2,400 paging services providers in the U.S. today. While some of these entities control large paging operations, the vast majority consist of small companies with fewer than 1,000 customers and mid-size companies with no more than a few thousand pagers in service. As a result, no company serves more than 12% of the paging marketplace.

Similarly, wireless two-way voice telecommunications services are characterized by increasingly vigorous competition. Every geographic market today includes at least two cellular carriers plus cellular resellers. In addition, enhanced specialized mobile radio services ("ESMRs") are increasingly being deployed, and the FCC's new PCS decision will result in at least three additional providers in each market. Thus, FCC forbearance from many of the traditional

Title II regulatory requirements for CMS is both authorized by Congress and in the public interest.

Third, preemption of state rate and entry regulation of both CMS and private services is appropriate and necessary to avoid a Balkanized approach to regulation of wireless services. Permitting inconsistent state regulation would (1) impede the development of innovative services and the delivery of both existing and new services to the public; (2) increase the cost of such services to the end users; and (3) undermine the workings of the competitive market by perpetuating disparities in regulatory treatment of like services. To the extent that state regulatory commissions seek to extend or impose regulation, the Commission should evaluate such requests under standards that recognize the highly competitive nature of the mobile services marketplace while ensuring timely and expedited action.

Fourth, regardless of their regulatory classification, mobile radio services require federally protected rights of interconnection to the public switched telephone network in order to deliver their services to end users. Mobile carriers should have co-carrier rights to negotiate the terms and conditions of interconnection to ensure being afforded the reasonable and non-discriminatory interconnection capabilities necessary for the conduct of their businesses.

Finally, mobile service providers should be permitted the maximum flexibility to make use of their facilities to deliver services to the public. As advocated in Telocator's "Flex Cellular" petition[3] and in its comments on the regulatory treatment of broadband PCS,[4] the providers of wireless services should be permitted to offer both CMS and private services over their assigned frequencies. Such flexibility will promote both the efficient utilization of spectrum and the delivery of the greatest number and diversity of applications to end users.

II. DEFINITIONS

A. Mobile Service

The definition of "mobile service" under revised Section 3(n) of the Communications Act is nearly identical to the definition contained in Section 3(n) in its prior form. Both sections define a mobile service as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes both one-way and two-way radio

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[3] Telocator Petition for Rulemaking, RM-7823, at 7-9 (filed Sept. 4, 1991) ("Flex Cellular Petition").

[4] Telocator Comments, GEN Docket No. 90-314, at 13-14 (filed Nov. 4, 1992) ("Telocator Comments").

communication services."[5] In addition, new Section 3(n) specifies that traditional private land mobile services, which were previously defined in Section 3(gg) of the Act, and personal communications services are included in the definition of "mobile service."

Telocator agrees with the Commission's assessment that the amendment of Section 3(n) does not change substantively the definition of "mobile service."[6] The purpose of the amendment was simply to clarify that private land mobile services and personal communications services are included within the family of mobile services for regulatory purposes, consistent with Congress's broad goal to create a uniform framework for the regulation of mobile service providers. Accordingly, Telocator supports including within the definition of "mobile service" all public mobile services regulated under Part 22, mobile satellite services regulated under Part 25, private land mobile services currently regulated under Part 90, mobile marine and aviation services regulated under Parts 80 and 87, and personal radio services (other than IVDS) regulated under Part 95.[7]

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[5] 47 U.S.C. § 153(n)(1983); 47 U.S.C. § 153(n)(1993).

[6] Notice ¶ 9.

[7] Notice ¶ 9 & n.8.

B. Commercial Mobile Service

As amended, Section 332(d)(1) of the Communications Act states that a mobile service will be classified as a "commercial mobile service" if two criteria are satisfied: (1) the service is "provided for profit," and (2) "interconnected service" is made available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." "Interconnected service" is defined in Section 332(d)(2) as "service that is interconnected with the public switched network" or for which a request for interconnection is pending under Section 332(c)(1)(B). Telocator submits the following in response to the Commission's request for comment concerning the definition and application of each of these components.

1. Service Provided for Profit

The legislative history of the Budget Act does not discuss the "for profit" element of the definition of a commercial mobile service. In Telocator's view, however, it is clear that by adding this component, Congress intended to exempt from the CMS definition government and non-profit public safety services and businesses that operate mobile radio systems solely for their own, internal use. This interpretation is consistent with the Commission's tentative conclusions set forth in paragraph 11 of the Notice.

However, those licensees who sell excess capacity on their internal systems to others for a profit should be deemed to be providing a "for-profit" service to the extent of those sales. This is essential to the appropriate regulatory classification of the relevant portions of their systems to meet regulatory parity goals.[8] Likewise, shared systems under Part 90 should be treated as not-for-profit where communications service is provided on a cost-shared basis with no licensee seeking or securing a profit therefrom.[9]

2. Interconnected Service

In the Notice, the Commission opines that, by using the phrase "interconnected service," Congress intended to draw a distinction between communications systems that are physically interconnected with the public switched network and systems that are not only physically interconnected, but that also make interconnected service available.[10] Telocator, for its part, believes that the most likely intention of Congress was to classify a mobile service provider as making interconnected service available if it enables subscribers to directly access the public switched telephone network (PSTN)

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[8] See Notice ¶ 12.

[9] Id. ¶ 13.

[10] Id. ¶ 15.

for the purpose of initiating or receiving messages.[11] This definition would be met by such existing services as cellular radiotelephone and paging.

3. Public Switched Network

Telocator agrees with the Commission that Congress intended for "public switched network" to be used interchangeably with "public switched telephone network."[12] Further, the Commission's traditional definition of "public switched telephone network" (PSTN) is appropriate for the purposes of Section 332. Under this definition, "public switched network" consists of the local and interexchange common carrier switched network, including both wire and radio facilities.[13]

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[11] While Telocator recognizes that case law exists under old Section 332 that treats "store-and-forward" paging as not constituting an interconnected service, amended Section 332 authorizes and the present proceeding allows the Commission the opportunity to define interconnection as necessary to achieve a rational and consistent policy in this regard.

[12] Id. ¶ 22.

[13] Id.

4. Service Available to the Public or to Such Classes of Eligible Users as to be Effectively Available to a Substantial Portion of the Public

A mobile radio service is appropriately deemed "effectively available" to the public regardless of eligibility limitations so long as the service may in fact be obtained by a large sector of the public. This is confirmed by the legislative history of new Section 332, which reveals that the original House version required service to be available to "broad classes of eligible users" in order to be classified as a commercial mobile service. According to the Conference Report, the word "broad" was deleted from this definition to ensure that "commercial mobile service" would include "all providers who offer their services to broad or narrow classes of users so as to be effectively available to a substantial portion of the public."[14]

Under this formulation, entities such as wide-area SMRs and PCPs from whom virtually the entire public are eligible to take service would satisfy the public availability criterion. This would help ensure that services competing in the same markets are subject to consistent regulation.

Finally, it is neither necessary nor appropriate for the Commission to look primarily or exclusively to system

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[14] H.R. Rep. No. 213, 103d Cong., 1st Sess. 496 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1185 ("Conference Report").

capacity in examining this aspect of the definition of a CMS.[15] The agency has never relied on system capacity to ascertain regulatory status. To do so now could create disincentives to employ new capacity-enhancing technologies and inappropriately result in the disparate regulatory treatment of competing providers.

5. Private Mobile Service

The Commission also solicits comment on how mobile services should be classified under the definition of "private mobile service." Section 332(d)(3) defines "private mobile service" as any mobile service that is not a commercial mobile service (as defined in Section 332(d)(1)) or the "functional equivalent of a commercial mobile service."

The Notice invites comment on statutory and Conference Report discrepancies concerning the language of the Act.[16] Notwithstanding the outcome of that debate, it is clear that functionally equivalent services should be subject to similar regulation. Indeed, that principle should be applied uniformly across the full range of wireless services. For example, consistent with the discussion in the Conference Report concerning the classification of systems serving

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[15] See Notice ¶ 26.

[16] See id. ¶ 29. See also Conference Report at 495-96, 1993 U.S.C.C.A.N. at 1184-85.

limited geographic areas and not employing frequency reuse as private,[17] the Commission might designate small SMRs as private insofar as these systems are not functionally equivalent to cellular systems or Enhanced SMRs (ESMRs).[18] If that were the case, then traditional mobile radio telephone service (IMTS) licensees should likewise be classified as private under the "functional equivalence" test because IMTS is equally dissimilar to cellular or ESMRs and competes directly with the small SMRs, not with cellular or ESMRs.

III. REGULATORY CLASSIFICATION OF EXISTING SERVICES

A. The Public Interest Requires That Competing Services Be Regulated Similarly

The Act allows the Commission to establish different classes or categories of commercial mobile services and apply the appropriate degree of regulation (or deregulation) to each category. The FCC should exercise this discretion in a manner that ensures that functionally equivalent or directly competitive services do not receive disparate regulatory treatment. Where services are not functionally equivalent,

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[17] Conference Report at 496, 1993 U.S.C.C.A.N. at 1185.

[18] It should be stressed that, in this example, it would be a finding that such services lacked functional equivalence to a CMS (in this case, cellular) that would permit designating them as private. A decision on the regulatory category to assign a service cannot be based solely upon the underlying technology.

however, it may be appropriate to differentiate their regulatory rights and obligations even where they nominally bear the same generic classification as either CMS or private.

If functionally similar services which compete in the market are subject to different regulatory burdens, consumers will suffer because there will be less effective competition. Those services which are subject to more stringent regulations typically will experience higher costs and greater delays in introducing new services. They would also likely be required to reveal competitively sensitive information through tariffing, reporting, or other filing requirements and to subject their services to resale obligations. Perhaps most importantly, they could expect significant restraints on their ability to respond in a timely manner to customer needs for pricing and service options.

These factors will place regulated entities at a competitive disadvantage in the market place vis-a-vis those treated more favorably. The inevitable result will be regulatory gamesmanship as service providers attempt to avoid an adverse classification, which will inhibit market growth and service innovation to the detriment of the public. Consumers will benefit most if competing services are subject to the same regulations.

In contrast, no such adverse consequences could be expected where services that are not directly competitive are

regulated differently. Rather, it is clearly reasonable to tailor regulation to the specific "market conditions" facing differing groups of mobile service providers.[19] For example, logical regulatory distinctions might be drawn between paging/900 MHz PCS service providers and ESMR/cellular/ broadband PCS providers.

B. All Paging Offerings Should Be Classified Similarly and Subject to the Same Rules

Regardless of whether the Commission ultimately determines to classify paging as CMS or private, all such offerings should fall under the same regulatory classification and be subject to the same rules. Although there were once technical reasons for dividing services into private and common carrier paging, advances in technology and the marketplace have led to the emergence of similar services being offered under different regulatory regimes.[20] These disparities must now be removed in order for the paging market to reach its full potential. Moreover, because paging continues to be a rapidly changing service industry, the Commission should take care to ensure that newly emerging paging services that are competitive with existing offerings fall under the same

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[19] Cf. Notice ¶ 53.

[20] See id. ¶ 39.

regulatory classification to avoid the re-emergence of regulatory distinctions between like services.

It is equally important that the paging industry's regulatory status bring with it the interconnection rights and marketing flexibility that are essential to the delivery of innovative services to the public. The co-carrier interconnection rights currently enjoyed by Part 22 licensees and proposed for CMS providers appear satisfactory, but they must not be accompanied by common carrier-type restrictions. As discussed in more detail below, such regulation would have an adverse impact on the competitive paging marketplace and would hamper paging companies' ability to serve the public.

C. The FCC Should Allow CMS Providers To Provide Dispatch Services

As documented in Telocator's Flex Cellular petition,[21] the FCC should amend its rules to allow CMS providers to provide dispatch services. The amendments to the Communications Act give the Commission the authority necessary to terminate the dispatch prohibition.[22] In addition, there is no longer any technical reason to enforce the prohibition because of the increase in cellular capacity, particularly from the introduction of digital cellular.

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[21] Flex Cellular Petition at 11-13.

[22] 47 U.S.C. § 332(c)(2).

Allowing common carriers to provide dispatch service and, indeed, all other technically feasible services over their facilities, will further the public interest by increasing competition in this market and expanding the options available to consumers. CMS providers will be able to make more efficient use of their spectrum by using extra capacity to provide additional services. Permitting the provision of auxiliary services will also encourage licensees to develop advanced digital technologies which can significantly increase capacity.[23]

IV. REGULATORY CLASSIFICATION OF PCS

A. Telocator Supports the Commission's Tentative Conclusion That No Single Regulatory Classification Should Be Applied to All PCS Services

Because of the diversity of communications services that will be available to the public, the Commission may need more than one classification for regulating mobile services. For example, paging and 900 MHz PCS have different characteristics from ESMRs, cellular and 2 GHz PCS. Nonetheless, Telocator urges that all services which consumers view as alternative market choices be put in the same category and be subject to the same regulations. As discussed above, if competing services are subject to different regulatory

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[23] Flex Cellular Petition at 14.

structures, those with the more stringent regulations will be less competitive, ultimately raising prices for consumers.

Telocator also supports permitting PCS licensees to provide both private services and CMS on their assigned frequencies. Such self-designation flexibility will produce significant public benefits. However, consistent with the above, existing mobile service providers that will be classified as CMS must have the same flexibility.[24] With the increased competition such flexibility will generate, the marketplace will offer consumers a broader range of prices, options and capabilities.

V. APPLICATION OF TITLE II TO CMS

A. The FCC Should Promptly Exercise Its Authority To Forbear Generally From Title II Regulation of CMS

To the greatest extent possible, competition rather than regulatory intervention should govern the competitive, wireless communications market. The record in the Competitive Carrier[25] and Nondominant Carrier Tariffing proceedings[26] demonstrates that the public interest bases for forbearing

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[24] See Telocator Comments at 13-14.

[25] Competitive Common Carrier, 98 F.C.C.2d 1191 (1984) ("Competitive Carrier").

[26] Tariff Filing Requirements for Nondominant Carriers, FCC 93-401 (Aug. 16, 1993) (Memorandum Opinion and Order).

from Title II regulation of CMS, and the recent amendments to the Communications Act explicitly conferred the authority on the FCC to do so.[27] The Commission should not delay in exercising that authority to the fullest lawful extent.

The significant competition in the common carrier paging market makes Title II regulation clearly unnecessary. As many as 40 common carriers may operate in the 900 MHz band alone, with additional paging channels available in the low band VHF (30-50 MHz), high band VHF (148-174 MHz), UHF (450-512 MHz), and FM subcarrier (88-108 MHz) bands. When private carrier paging companies and shared and individual private radio paging licensees are considered, the competition for paging services is even greater. This competition has led to a decrease in paging services prices, as well as the development of new services, such as advanced messaging.

Other mobile services markets are similarly competitive. There are numerous facilities-based providers and resellers in the two-way voice mobile services market. In most markets today, there are cellular carriers, cellular resellers, ESMRs, and SMRs competing with each other.[28] Mobile satellite services, wireless in-building services, and cordless phones also offer forms of competition. In the upcoming PCS

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[27] 47 U.S.C. § 332(c)(1)(A).

[28] CTIA, "The U.S. Cellular Telecommunications Industry: An Overview Analysis of Competition and Operating Economics" at 12-16 (August 26, 1992).

auctions, seven more PCS licenses will be awarded in each market, expanding both the quantity and the variety of new services. Consumers have significant choices both among carriers of one service and between services.

This high level of competition demonstrates that traditional common carrier tariff regulation is, in particular, unnecessary for CMS. In fact, the FCC has determined that tariff regulation of a competitive market will actually inhibit competition, innovation, market entry, and flexibility.[29] The absence of any countervailing public benefits establishes that tariff requirements and related provisions of Title II[30] should not be applied to CMS. For the same reasons, application of other provisions of Title II such as certain filing requirements and business organization and transactional limitations[31] would likewise be ill-advised. Under Sections 201, 202, and 208, the FCC retains the authority necessary to correct any unanticipated, future market failures which may occur.

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[29] Tariff Filing Requirements for Nondominant Carriers, FCC 93-401 (Aug. 18, 1993) (Memorandum Opinion and Order) (footnote omitted), Erratum No. 34716 (released Aug. 31, 1993).

[30] E.g., 47 U.S.C. §§ 210, 213, 215, 219 and 220.

[31] E.g., 47 U.S.C. §§ 205, 211, 212, 214, 218 and 221.

B. TOCSIA Regulations Should Not Be Enforced Against CMS Providers

For similar reasons, application of the requirements of the Telephone Operator Consumer Services Improvement Act ("TOCSIA") to CMS providers is not necessary to protect consumers.[32] The types of abuses involving operator services offerings that TOCSIA was designed to prevent simply have not arisen in the mobile services context. That is not surprising because subscribers perceive mobile communications to offer specialized capabilities and expect them to incur charges that differ from the costs of conventional telephone service. Thus, the consumer notification and education requirements of TOCSIA would serve no useful purpose in the mobile environment.

Because no problem exists to be corrected, the substantial costs and difficulties CMS providers would face in implementing the provisions of TOCSIA cannot be justified. As demonstrated above, the widespread and vigorous competition in mobile services markets is, and will continue to be, sufficient to ensure that subscribers enjoy the benefits of reasonable and non-discriminatory rates and practices. Accordingly, the FCC should exercise its discretion to forbear from enforcing TOCSIA requirements against mobile service providers.

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[32] See 47 U.S.C. § 226.

C. Paging Companies Should Not Have To Contribute to TRS

The FCC has been given express authority to forbear from requiring paging carriers to contribute to the interstate Telecommunications Relay Service (TRS), and should do so.[33] The intent underlying the TRS requirements was to secure funding from providers of interstate telephone voice transmission services, not one-way services such as paging.[34] Because the Commission has concluded that other non-voice satellite services are exempt from both providing and funding TRS capabilities, there is no reason to treat paging any differently.[35]

In addition, TRS modifications serve no purpose in this context. Paging services are already accessible to those with hearing and speech disabilities. Pagers which vibrate to signal receipt of a message are readily available in the market place. Moreover, pagers typically display alphanumeric messages which are as easily red by individuals with hearing impairments as by those without such disabilities. Since neither the paging industry nor its subscribers benefit

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[33] Id. § 332(c)(1)(A).

[34] Telocator Petition for Reconsideration, at 3-4, CC Docket No. 90-571 (filed Aug. 25, 1993).

[35] Third Report and Order, FCC 93-357 (released July 20, 1993).